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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOSEPH RALPH BURTON, PLAINTIFF in error,
v.
THE UNITED STATES.
} No. 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Plaintiff in error was indicted on January 23, 1904, for violation of section 1782 of the Revised Statutes, in that, being a Senator of the United States, he received pecuniary compensation from the Rialto Grain and Securities Company, of St. Louis, Mo., for services rendered by him to the company in a certain matter pending before the Post-Office Department in which the United States was directly interested.

The indictment contained nine counts (Rec., pp. 3–18). The first count charged as follows:

> That on the 26th day of March, A. D. 1903, at the city of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, the said Joseph Ralph Burton, Senator as aforesaid, did unlawfully, knowingly, willfully, and corruptly take, accept, and receive from the Rialto Grain and Securities Company (a corporation duly organized under the laws of the State of Missouri) the sum of five hundred dollars lawful money of the United States, of the value of five hundred dollars (the particular kinds and denominations of which are to the grand jurors aforesaid unknown), as compensation for the services of him, the said Joseph Ralph Burton, Senator as aforesaid, theretofore, to wit: On the 22d day of November, A. D. 1902, and on divers other days between said last-mentioned date and the said 26th day of March, A. D. 1903, rendered by him, the said Joseph Ralph Burton, Senator, as aforesaid, to the said Rialto Grain and Securities Company before the Post-Office Department of the United States, in a certain matter then and there pending before said Post-Office Department, in which the said United States was directly interested, that is to say, whether the said Rialto Grain and Securities Company had violated the provisions of section 5480 of the Revised Statutes of the United States, in that it (said company) had through its officers, agents, and servants devised a scheme and artifice to defraud, which was to be effected by said Rialto

Grain and Securities Company, through and by its officers, agents, and servants, in opening correspondence and communication with divers persons resident within the United States, by means of the Post-Office establishment of the United States, and whether said Rialto Grain and Securities Company, by its said officers, agents, and servants in and for executing said scheme and artifice to defraud, had placed or deposited any letter or packet in any post-office of the United States, to the end and for the purpose of enabling the Postmaster-General of the United States, in pursuance of the authority vested in him by law, to ascertain, find, and determine from the evidence satisfactory to him, the said Postmaster-General, whether he should order and direct the postmaster at St. Louis, Missouri, not to deliver to the said Rialto Grain and Securities Company, but to return with the word "Fraudulent" plainly written or stamped upon the outside (as authorized by section 3929 and section 4041 of the Revised Statutes of the United States, as amended by the act of Congress of March 2, 1895), any and all letters addressed to said Rialto Grain and Securities Company, and sent to or through the post-office at St. Louis, Missouri, by means of the Post-Office establishment of the United States.

And the grand jurors aforesaid, on their oaths aforesaid, do further present that the services so as aforesaid rendered to the said Rialto Grain and Securities Company by the said Joseph Ralph Burton, Senator as aforesaid, consisted in part of visits to the said Postmaster-General,

the Chief Post-Office Inspector, and other officers of the Post-Office Department of the United States, and of representations and statements made to the said Postmaster-General, the said Chief Post-Office Inspector, and said other officers, which said visits, representations, and statements, so as aforesaid made by the said Joseph Ralph Burton, were made with a view and for the purpose of inducing said Postmaster-General, the said Chief Post-Office Inspector, and said other officers to decide the question so as aforesaid pending before said Post-Office Department in a manner favorable to the said Rialto Grain and Securities Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

The second count differs from the first count only in alleging that the matter pending before the Post-Office Department was one in which the United States was *indirectly* interested.

The payment is charged in the third count to have been made by "W. D. Mahaney, an officer and employee of the Rialto Grain and Securities Company;" in the fourth count by Hugh C. Dennis, and in the fifth count by W. D. Mahaney, "an employee of Hugh C. Dennis."

The sixth, seventh, and eighth counts charge the payment on various dates of checks for $500 each, drawn by the Rialto Grain and Securities Company by Hugh C. Dennis, president.

The ninth count charges a further payment of $500,

by check of said company, by W. D. Mahaney, vice-president.

Defendant was arraigned in the district court of the United States for the eastern district of Missouri, pleaded not guilty to the charges contained in the indictment, and was admitted to bail (p. 19). The plea was subsequently withdrawn and a demurrer to the indictment filed on the grounds that upon the facts stated in the indictment the Postmaster-General had no authority to make an order forbidding the use of the mails to the company, and that no matter or thing was pending before the Post-Office Department in which the United States was interested within the meaning of section 1782. The demurrer was overruled (p. 21), the opinion of the court thereon appearing at pages 279–285 of the record.

Before the trial was commenced, and at the request of the district attorney, the court ordered that the indictment be dismissed as to the fourth and fifth counts (p. 22).

The case was called for trial March 22, 1904, defendant pleading not guilty, and on March 28, 1904, the jury returned a verdict of guilty as to counts 1, 2, 6, 7, 8, and 9 of the indictment, and not guilty as charged in count 3 (p. 24).

Defendant moved for a new trial and in arrest of judgment, the motion in arrest setting forth, among other things, that the privilege of freedom from arrest granted to defendant during the session of the Senate was a prohibition against arrest or judicial proceedings

which could not be waived by him (pp. 25, 278). The motions were overruled by the court. Thereupon the district attorney asked the judgment and sentence of the court upon the verdict of guilty as returned by the jury, and sentence was pronounced of a fine of $2,500, with imprisonment for six months (pp. 25–26).

At the commencement of the trial counsel for defendant requested a larger number of jurors for the purpose of peremptory challenges, on the ground that the offense was infamous. This request was refused, the court ruling that the offense was a misdemeanor, and that the challenges should be limited to three on each side (p. 27).

The following facts appear from the testimony of the witnesses and from the documentary evidence introduced: That during the period between November, 1902, and August, 1903, the Post-Office Department was conducting an investigation, growing out of complaints received from various sources, to ascertain whether the Rialto Grain and Securities Company had devised a scheme to defraud, and was unlawfully using the United States mails to that end (pp. 57, 58, 70, 71, 72, 203, 204); that during the greater portion of the period in question Senator Burton was acting as counsel for said company under an agreement that he should receive the sum of $2,500 in compensation, paid in monthly installments of $500 (pp. 80–85, 91–93, 94, 173); that services were actually rendered to the company by defendant in connection with the matter then pending

before the Post-Office Department, consisting in part of visits to the Department for the purpose of making inquiries and receiving information, arranging for a hearing if such should become necessary, and in general making representations in favor of the company (pp. 94, 118–119, 135–139, 140); that the four checks mentioned in the sixth, seventh, eighth, and ninth counts of the indictment were mailed by the company to defendant in Washington, and were deposited by him in the Riggs National Bank, of Washington, D. C. (pp. 106, 107). It was also stipulated by counsel, the stipulation being read in court in the course of the trial, that these checks were duly received by the defendant in Washington, D. C., were indorsed by him, and deposited with the Riggs National Bank, and were afterwards duly paid by the Commonwealth Trust Company at St. Louis, Mo. (p. 111).

Being in doubt as to the correct method of review, defendant first sued out a writ of error from the circuit court of appeals for the eighth circuit and thereafter presented a petition to this court for a writ of error to the district court of the United States for the eastern district of Missouri, which was allowed July 9, 1904. A petition for writ of certiorari to the circuit court of appeals has also been filed, although not yet passed upon by the court.

THE STATUTE AND ITS HISTORY AND PURPOSE.

Section 1782, Revised Statutes, provides:

> No Senator, Representative, or Delegate, after his election and during his continuance in office,

and no head of a Department or other officer or clerk in the employ of the Government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military, or naval commission whatever.

Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the Government of the United States.

This statute was drawn from the act of June 11, 1864, the language of which is substantially the same. The bill, as originally introduced, contained additional and more stringent provisions, making it an offense for a member of the Senate or House of Representatives to act as counsel, with or without compensation, in any court, in a cause in which the United States was a party or directly or indirectly interested, or to receive compensation of any kind for services of any description rendered by himself or another in relation to such cause or proceeding. These provisions were subsequently stricken out, and with the insertion of

the words "court-martial" and one or two other unimportant changes, the bill was passed after a short but spirited debate in the Senate. Although the remarks related mainly to the proposed amendment which prohibited members from practicing before a court-martial, it is quite evident from what passed in the course of the debate that the attention of Congress had been called generally to the evils resulting from the unrestricted practice of Senators and Representatives before the Departments, and had in mind specific instances showing that undue and improper influence had been exerted, especially in regard to claims pending in the Departments and before the bureaus of the Government. (Congressional Globe, Thirty-eighth Congress, first session, pp. 555–561.)

This act was passed in obedience to the just demand for a strict view of the relations of legislators to the executive branch of the Government. It needs no argument to show that the spirit of this law was always a moral rule of the highest importance for the guidance of members of Congress, to which every high-minded man, sensible of his duty and sensitive as to his honor, must at all times have bowed. It is too plain for words that when the free intercourse of necessity existing between the members of Congress and the heads of the executive administration of the Government is considered, and the proper influence relative to the interests of their localities and their individual constituents exerted by members of Congress is regarded, the taint of hire and every mercenary

consideration should be excluded. It was and is the only way to insure, as far as possible, honesty and freedom from all corrupt motives and interested personal objects in the public service.

It might be said that this statute attempts to erect a mere impropriety into a crime; that the line between true and legitimate representative service in the Departments and that which is forbidden is difficult to draw, and that many legislators in honest ignorance of the law or of its meaning and scope have done precisely what the accused did in this case. The reply to these suggestions is that it is the province of the legislature to define crimes, and the impropriety aimed at here is so gross and palpable that when it became a misdemeanor under the law it was high time that this result should be attained. As the moral sense of a community or nation becomes more sensitive, many things which were regarded as merely venial or improper have gone over into the category of definite offenses against the law. For instance, only exceptional people here and there during the eighteenth century in England thought that the corruption of the electorate was a very serious matter, and consequently statesmen of eminence, like Walpole, openly and shamelessly bribed boroughs and communities by wholesale. But by the time the reform sentiment culminating in 1830 took definite shape in legislation, the legislators of England wrote into her law very salutary provisions on that subject, and although it is possible that further steps in the same direction remain to be

taken there as well as here, bribery of electors and the bribery of public officers is now recognized everywhere as one of the most serious of offenses.

As to ignorance of the law, surely legislators are the last men who ought to plead that. And it is safe to say that, irrespective of any exact knowledge of this law, every legislator who has a just respect for his own personal character and a proper view of his public duties, instinctively would refuse to serve any individual or interest before a Department of the Government for compensation. It is very certain that the accused here knew of the law, because he accentuates the fact that the law puts a prohibition upon him in the testimony as to what occurred on the train and in the testimony as to his conversations in his committee rooms with Chief Inspector Cochran. The truth of it is that the accused knew the law well enough, was willing to take chances on "sailing close to the wind," and went much too far. It is true that here and there he protests that he will not violate his duty as Senator, but he protests too much. He was so conscious of his duty and the law, and yet so desirous of this employment and its earnings, that he blows hot and cold. His position is unmistakable and characteristic of all men who allow themselves to tamper with the highest standards of conduct.

When this law was first enacted (June 11, 1864), it was proposed in the bill as introduced to forbid members of Congress from practicing even before the courts in any case in which the United States was a party or interested. The bill in that respect perhaps went too

far. At all events, it aroused strenuous opposition, as shown by the debates, and therefore was finally passed *in invitum*, so to speak. (Congressional Globe, Thirty-eighth Congress, first session, pp. 555–561.)

If, then, it be true, as seems reasonable to say, that the law was extorted, as it were, from an unwilling and protesting spirit in Congress by the better sentiment, then all the more it is shown that it was necessary, and that it does not go too far.

ASSIGNMENTS OF ERROR.

There are forty-three assignments of error (XLIV as numbered, but XXXVIII was inadvertently omitted). The specifications present only four propositions of law for discussion. Beside the mere formal assignments (III, IV, XLII, XLIII, XLIV) certain other points raised may be dismissed with brief reference before the real questions are stated.

Thus, as to Specification II, regarding peremptory challenges (p. 253; see Rev. Stat., sec. 819), the trial court's ruling (p. 27) that the challenges should be limited to three on each side is sound, and the reasons therefor conclusive (p. 286, on motion for new trial):

> First. There was no error in refusing to permit the defendant ten challenges. Section 1782, under which the indictment was found, denominates the offense as a misdemeanor. Therefore section 819 of the Revised Statutes, as interpreted by *Bannon and Mulkey* v. *United States*, 156 U. S., 464; *Reagan* v. *United States*, 157 U. S., 303; *Harrison* v. *United States*, 163 U. S., 140, confers the right to three challenges only.

By all tests this is not an infamous offense, but a misdemeanor in name and nature.

The statute calls the offense a misdemeanor; the maximum punishment is two years' imprisonment and $10,000 fine. In all cases conviction works disqualification for office under the United States. The punishment imposed could hardly be called infamous, and the infamous nature of punishment does not raise an offense above the grade of misdemeanor and to the grade of felony. The word "felony" denotes at common law an offense working forfeiture of lands or goods, to which capital or other punishment might be superadded according to the degree of guilt. There is no inconsistency in that modern rule which holds that imprisonment in a State penitentiary with or without hard labor is an infamous punishment. (*U. S.*, v. *De Walt*, 128 U. S., 393; *Bannon & Mulkey* v. *United States*, and other cases cited *supra.*)

Finally, under the law relating to challenges (sec. 819, Rev. Stat.), it is only on the trial "of any other felony" than treason or a capital offense that the defendant is entitled to ten peremptory challenges. In other words, the kind or degree of imprisonment is not the sole test of felonies.

The sentence imposed, a fine and *six months' imprisonment* in a *county jail*, conforms to the distinction. (Rec., pp. 25–26).

Again, as to Specification XLI (p. 275), the refusal of the court to reiterate the defendant's requests to charge upon the jury's return for supplemental instructions, which requests had already been granted (pp.

242–244, 252), was entirely proper, as shown by the court (pp. 289, 291, 292), especially on the ground of seemliness and because the court had already, as just stated, given the instructions once "in connection with the charge, as amplifying the same," and because the jury returned for instructions only on two particular phases of the case:

> The court believed that by making special reference to those specific instructions [the defendant's requests which were granted] the jury's attention would have been improperly directed to *certain phases* of the total instructions, to the exclusion of the main and exhaustive instructions found in the charge itself (p. 292).

The assignments based on the admission of testimony object to the receipt of evidence showing that there were complaints against the Rialto Grain and Securities Company before the Post-Office Department and a pending investigation by the Postmaster-General (V–XIV); to the admission of the correspondence between Burton and Harlan and Mahaney (XV, XX–XXVIII); to the receipt in evidence of the checks paid to Burton by the company (XVI–XIX); to those portions of the court's charge which ruled substantially that the Postmaster-General is authorized to inquire as to the fraudulent use of the mails; that while such inquiry is pending a United States Senator is prohibited by law from taking any compensation for services rendered before the Department in the matter of such inquiry; that the United States was interested, directly and indirectly, in the pending inquiry as to

the Rialto Company; that if the jury find from all the evidence that such an inquiry was pending, and that the accused knowingly received compensation for services rendered before the Department with reference to that inquiry, he is guilty (XXX–XXXII).

Error is also assigned because the court treated the counts based upon the receipt of the checks (counts 6–9) as showing different offenses of the same kind, and not merely different statements of the same offense, as the receipt of the money paid (XXXIII, XXXIV); and because the court rejected the defendant's theory of the relations between the defendant and the Riggs Bank and as to the place of payment of the checks (XXXVI, XXXVII).

As to the additional offenses shown in counts 6–9, every time Mr. Burton received a new and additional payment of his illegal compensation, plainly he committed a new and additional offense. The trial court well says:

> The sixth count of the indictment relates to a transaction different from that involved in the first three counts which related to the cash payment of March 26, 1903. * * * *The elements* of the offense charged in this count are the same as those charged in the first and second counts.

The court's holding as to the seventh, eighth, and ninth counts was the same. I think this point may be dismissed without further argument, excepting the discussion *post* as to the place where the checks were paid.

Assignment XXXV complained because the court did not exclude evidence of "what was done by the defendant in the matter of McGowan, Bowman, and Shove." Burton's services in the Bowman and Shove episode were rendered at the Post-Office Department, and formed a part of that entire series of transactions, and will be referred to in our discussion of that main branch of the case. As to the McGowan matter, the court was eminently fair to the accused. McGowan was an Indian agent who had evidently been swindled by the Rialto Company and was threatening. Burton was proceeding to "smooth that out" at the Indian Office of the Interior Department. I quote the phrase as a colloquialism; it does not appear in the record; but that was what Burton was doing when he was stopped by a telegram by Mahaney, who had "fixed" the man or the matter at the other end. I may observe that Harlan, the company's attorney, thought that the conduct of McGowan, who was at St. Louis "making some claim," was "outrageous" and "disgusting" (rec., p. 196).

Judge Adams ruled out Burton's conversation with the Commissioner of Indian Affairs on this subject, on the ground that as the service or inquiry by Burton was in the Interior Department, and since Burton said nothing there about his relations to the Rialto Company, the incident was inadmissible (rec., pp. 133–134). Later, upon cross-examination, the court provisionally admitted testimony on the subject, but finally excluded it, as follows:

> The objection is sustained. I cut the question out on yesterday because it did not involve, so far as testimony went, any action or services rendered by the defendant in the Post-Office Department. I did it for the purpose of eliminating all foreign matters. (Rec., pp. 195–197.)

Now, I submit that obviously Burton could render services *in a matter pending in the Post-Office Department* by pursuing *some branch* of the same inquiry which *ran into another Department*—that is, by performing service in the same matter in another Department also. I submit that clearly the learned court was in error in excluding the McGowan incident, and that at least the defendant has nothing to complain of in the ruling upon that matter. So far, therefore, we need not further consider Specification XXXV.

Assignments XXXIX, XL object to the language of the court addressed to the jury when they returned for specific instruction on two points. I have already touched upon this episode in part in commenting briefly, but I think sufficiently, on assignment XLI. I submit without a word of additional argument that Judge Adams pointed out, with admirable lucidity and dignity and with an accurate sense of all the proprieties of the situation, the respective functions of court and jury, the duties and responsibilities resting upon the jury; and that he expounded clearly and soundly the law applicable. (Rec., pp. 246–253; and again at pp. 268–274.)

The foregoing analysis shows, I think, that the only important questions in the case are these:

1. Was there any proceeding, charge, or other matter or thing pending before the Post-Office Department in which the United States was directly or indirectly interested?

2. Did the accused render services and receive compensation in such a matter?

3. In reference to the place of payment of the money and checks, did the district court have jurisdiction?

4. Was it legal and competent for the accused to waive, as he promptly and voluntarily did, his personal privilege of exemption from arrest as a member of Congress?

THE HISTORY OF THE CASE.

Mr. Burton was introduced in November, 1902, to Dennis, the president, and Harlan, the attorney, of the Rialto Grain and Securities Company, an incorporated "bucket shop," making small speculative grain ventures their specialty for numerous "clients" all over the country. Dennis was a well-known operator of that kind, a trader and promoter, along with other lines of business. The company was in reality the successor of the Brooks Brokerage and Commission Company; was, in fact, the Brooks company in another form. It had the same officers, directors, and employees in part, the same offices, and the same plant, and was doing the same sort of business with the same customers. The Brooks company had been in well-deserved trouble because of the character of its business, and Dennis

had been, and was then, in trouble on that account. An indictment in the Federal court was imminent, and proceedings were anticipated against the Brooks company and its owners or officers in the State courts of Missouri. At that very time complaints against the Rialto company had been lodged with the Post-Office Department. An investigation by the Department was in progress, and soon thereafter Dennis and Brooks were indicted in the Federal court for violation of section 5480, Revised Statutes.

On the very day of Burton's introduction to Dennis and Harlan, he traveled to Chicago with Harlan and Kastor, the man who introduced them. On that journey the arrangement by which Burton became the counsel of the company and its representative before the Post-Office Department was made, and the unwilling witnesses (Kastor, rec., pp. 78, 91; and Harlan, pp. 167, 188) tell the story of the trip and inevitably disclose the real intent and understanding regarding Burton's employment. It is evident that in Kastor's mind at least the usefulness of Burton was suggested and the value of an introduction to the officers of the company emphasized, because Burton, before he was Senator of the United States, if not afterwards, had represented a certain Weltmer before the Post-Office Department in a fraud-order proceeding. It may be noted that the Weltmer case ultimately reached the courts, and was known in this court as *American School of Magnetic Healing* v. *McAnnulty* (187 U. S., 94).

On the train Harlan proposed that Senator Burton

become counsel for the Rialto Company, mentioning legal matters coming up in regard to the Brooks Company, the supervision of the company's "literature"—the "leaflets" and "booklets," and pamphlets like that on page 38 *et seq.* of the record, and the one called "Giant Oaks from Tiny Acorns Grow," referred to on page 52 and elsewhere, which were obviously and insidiously intended to stimulate the speculative craze in the company's dupes—this supervision to be for the purpose of seeing whether the literature violated the postal laws and regulations; in other words, whether there was a scheme or artifice to defraud. It was proposed that the Senator's name be placed on these advertisements as chief counsel, and in consequence it was placed there. Burton was to be paid $2,500, and in fact he received that sum in five monthly installments of $500 each, the termination of the arrangement being broached by Mahaney, the secretary of the company, immediately after Congress adjourned in March, 1903, and the final payment being made in cash at St. Louis on the 26th of that month. Something was said about Burton's acting as counsel on the indictment then feared, and which was afterwards found against Dennis, with Brooks, because of transactions of the Brooks Company. Burton said he could not act before the Departments. Harlan, seeking to emphasize the employment of Burton as general counsel only, accentuates a part of the conversation which referred to a proposed branch of the business as promoting railroads and marketing securities, but this never came to anything and was entirely "in

the air." If it meant anything at all it was a mere blind to give respectability to the company's operations and conceal and gild its real business.

Notwithstanding the emphasis on the supposed distinction between Burton's function as general counsel and any departmental services, Harlan is forced to admit substantially that the company had the right to call upon him for such services, as he was employed, and desired him to go to the Post Office Department at Washington and learn about the complaints and the case against Dennis, and understood his employment covered such service; that Burtion was the representative of the Rialto Company at Washington and was paid for it, although the company had no business at Washington outside of their Department interests.

Harlan further says that under the so-called contract made on the train, he would have felt free to call upon Burton to ascertain whether complaints had been made or post-office inspectors sent, leaving it to Burton's own judgment to determine whether he should make the request, whether he was to overstep the bounds of a Senator or not. It is evident that the matter of inquiry or service at the Department was fully discussed. Harlan testifies that Burton said: "Then if asked at the Department, I am safe in saying that it is the purpose of the Rialto Grain and Securities Company to comply with every rule and order of the Department." This inquiry was due to the discussion which grew out of Harlan's explanation of the operations of the company relative to violation of the postal laws under section 5480, Revised Statutes.

It was said to Burton by his friend Kastor, either on the train or elsewhere and previously, that Burton's knowledge gained in his connection with the Weltmer case before the Post-Office Department would be of advantage to the company. Notwithstanding the effort in the testimony to confine Burton's engagement to the duties of general counsel (whatever that may mean), and to show that he accepted the employment excluding the idea of appearing before the Departments, immediately after the Chicago trip Harlan wrote Burton confirming the engagement as counsel and referring to the proceedings against Dennis before the Federal grand jury growing out of the Brooks Company business, showing inevitably, though not in terms, why Dennis was compelled to organize the Rialto Company, manifestly to run the business of the Brooks Company under that name, because of the latter company's malodorous reputation and the attacks on him (Dennis) by the former owner of the Brooks Company (Brooks), who was finally indicted jointly with Dennis.

The fact was brought out in the record that not only was Dennis indicted because of the Brooks Company business, but that indictments were pending in the district court against Dennis, Mahaney, and McRae, growing out of the management of the Rialto Company.

In the letter Harlan, the Rialto Company's attorney, spoke of "our labors to save Dennis," and suggested that Burton inquire about the facts at the Post-Office Department, by which he would "perform a great

service for us" at this time. The inevitable revelation of the real nature of Burton's arrangement and services as provided for on the train comes out more strongly in Burton's reply to this letter. He called at the Department and found that there were two complaints there against the Rialto Company—"your company." He thinks the company should satisfy complaints; especially should this be the motto until the Brooks matter is entirely out of the way. This is highly significant of the standards of conduct in the minds of all these men and of their methods. They trade and thrive on the knowledge that individual losses are small, that a large percentage of losers do not "make trouble" for various motives, including shame at their own folly, that "kickers" can be put off or quieted in many ways without much cost, and finally when a certain residuum of complaints does reach the Post-Office Department, they seek influence and secure services which may effectively save them from disaster.

Burton arranged with the Department to be advised in case complaints of the company were made, and for hearing if one were necessary. He assured the Department that the company purposed to comply strictly with the law and to remain in harmony with them; he said that all the trouble arose from the Brooks Company, and that Dennis had succeeded and formed a new company which had taken over the business of the old company. He said the new company was doing a straight business and was all right. In his letter stating this fact, he also informed Harlan that no action

would be taken without notice, and that an opportunity for hearing or explanation would be given. He closed his letter as follows:

> In return, if agreeable, you may make remittance for my first month's pay.

The expression "in return" is singularly unfortunate; not "by return mail," as he might have said, or, without any such expression, trusting to his client's promptness, but "in return," thus emphasizing the compensation as following immediately *in return* for the services rendered up to that point which he has just specified.

This case could be rested on the facts already shown along with the payment of that first month's pay which immediately followed.

On November 22 Mr. Harlan wrote to Mr. Burton again, and shows that the first claims or complaints against the Rialto Company had been investigated by the inspector, who made, as he is informed, a report in favor of the company. Thus he posts Burton instantly on that subject, advises Burton that he will be in Washington within a few days, and sends him a check for $500 "in return." Harlan says that he went to Washington to see Burton as counsel in the matter of the proposed indictment against Dennis; wanted to consult him to learn whether he could suggest anything to prevent the indictment. What occurred at the interview between Harlan and Burton at that time does not appear.

On December 2 and also on December 3 Harlan wrote Burton again. In the letter of December 2 he

informed him that Dennis, Brooks, and Garland, of the Brooks Company, had been indicted. He uses the words "we" and "us" as including Burton in one aspect and in another as showing that the Brooks people and business and the Rialto Company are identical. He anticipates that complaints against them will pour into Washington. He believes that locally "we will be able to control the situation, as this business has been pretty thoroughly gone over by the inspectors, and they understand just what we are doing and how we are doing it. At your end of the line you will of course use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post-Office Department, or to submit to any examination they may direct." Manifestly, this does not refer to Burton's representation of Dennis as an individual under the indictment for the Brooks business, but includes the current business and interests of the Rialto Company in the Post-Office Department.

In the letter of December 3 Harlan refers to a loser by the company, named Bowman, who represented himself at the St. Louis office as a post-office inspector and undertook to force a settlement "contrary to his just rights, and did succeed by reason of his representation in getting a little the best of the company." What a confession is this of their knowledge of transgression and proper fear of the law! He also speaks of another supposed inspector, named Shove, who was pursuing the same methods to recover his losses. He calls atten-

tion to this matter for Burton's information. The manifest connection between the Brooks case and indictments and the Rialto Company situation is again shown because the mails are bringing in letters inclosing newspaper clippings, but most of the letters are "fair," and "if the situation gets no worse * * * the Rialto Company will have but little trouble in getting through." Burton called at the Post-Office Department and made an inquiry about the persons falsely claiming to be inspectors, and obtained the desired information. He wanted to know if such persons were inspectors and if they were investigating the case. On December 9 he advised Harlan that Bowman was not a post-office inspector, "and by impersonating one has rendered himself liable to punishment;" that Shove also is a fraud, and that "there has gone from this office [meaning the Post-Office Department] no instructions whatever about the Rialto Company, and there is nothing in this office against you at this time. The matter in St. Louis, as you know, is in the hands of Mr. Dice there. * * * I will take care of things at this end of the line."

It could hardly have surprised the company and Mr. Burton that they had to deal with "frauds." Burton means, evidently, that there is nothing additional in the Department yet, because he is perfectly aware, as the letter shows, of the complaints already pending in the Department and in the hands of the St. Louis inspector.

On December 15 Burton, Dennis, and Mahaney met

in Washington. The indictment against Dennis was discussed. Burton asked about the conduct of the Rialto Company and the rules governing marginal trading. Burton took Dennis to the Post-Office Department, and said first that he wanted Inspector Cochran to meet Dennis and see what a fine man he was, and he repeated the assurance that the company was endeavoring to do a straight business, and also his former statement that all the trouble arose from the conduct of the Brooks Company. It was stated that they did not wish to antagonize the Department, and wanted to do exactly as the Department wished.

On December 24 there was a conference at St. Louis over the Dennis indictment and the Rialto Company affairs between Burton, Harlan, Mahaney, and Judge Krum, afterwards one of Burton's own counsel. Mahaney says it was agreed that Burton should not take part on the trial of Dennis, because that might show he was too much interested in the Post-Office feature of the case, and thus antagonize the Post-Office officials. Harlan and Krum say that Mahaney's statement is unfounded; that Harlan wished Burton to appear, and Krum suggested it would be a mistake to weight the case down with counsel, and Harlan accepted that conclusion. But it is evident from Harlan's cross-examination that Mahaney was not mistaken, because while Harlan insisted that the reason given by Mahaney was not given at the conference on December 24, he admitted that at his next conference with Krum the latter suggested that probably Burton had

better not appear, because that might detract from his influence at Washington, and Harlan disagreed with that view. Judge Krum's denial of Mahaney's statement was confined to the interview of December 24.

On January 24, 1903, Burton called again upon Cochran and asked that books and records of the company—manifestly a part of those they had inherited from the Brooks Company—which had been turned over to Inspector Dice in the investigation of the case before the Federal grand jury should not be turned over to the State courts for action there, as Dice proposed to do, Burton stating that these records had been surrendered voluntarily and it was a breach of faith on Dice's part to make that use of them, and asking that Dice be ordered to return the books. He was informed that Harlan should see the United States attorney, and that Dice would be governed entirely by the instructions of the latter. But Burton insisted that something be done at once, and the case was stated to an Assistant Postmaster-General, who declined to give the order; and the matter was then presented to the Postmaster-General, who evidently directed that the order be given substantially as asked for by Burton. The language of the telegram was excluded, although Dennis's trial was over long before the dispatch was sent, and it was offered for the purpose of showing the continuing relations that existed between Burton and Dennis and the Rialto Company.

In reference to this incident it further appears that on February 5 Burton received the telegram from

Harlan saying that Dice had delivered the company's books to the State authorities, where they were held subject to his order; that the United States attorney had no further use for them; and asking Burton to obtain an order requiring Dice to deliver them to the company. On the same day Chief Inspector Cochran saw Burton at the latter's office and at his request; Burton read this telegram from Harlan, and insisted that Dice was acting in bad faith in keeping the books, and thereupon Cochran promised to send a telegram of inquiry the next morning. Burton then said that he wished to appear in this and other cases before the Department, but did not wish to antagonize the Department—rather the other way; that he had incurred losses and could make money in that way and apply it to his debts; that other Senators had materially increased their income by such practice, and it was all right. He asked Cochran to warn him when he overstepped the bounds.

On February 11 Burton wrote Harlan acknowledging the telegram, saying that "things were satisfactory" between Harlan and Dice, and expressing the hope that Harlan would not let Dice "mislead you in any way." Apparently that was not jocular in intention, but it *is* humorous. Mr. Burton advised that he would be in St. Louis as soon as Congress adjourned, and added:

> Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the Department in

> a good humor with Major Dennis, and think I have succeeded. If agreeable, on receipt of this, I wish you would have my month's pay sent in so I can reach it by Monday next. (Rec., p. 139.)

On February 14 Mahaney telegraphs Burton: "Thanks for letters." He says a State investigating committee is asking for information; that Harlan says there is no occasion for anxiety; "all we want is unbiased investigation. Do you think you can do anything to help situation? Check mailed to-day." (Rec., p. 129.) Apparently Mahaney thinks the State investigation would stimulate the Federal investigation, and wishes Burton's aid so that the Washington situation should be controlled or quieted if possible.

It is curious to note how the report of service is immediately followed by a reminder that payment is due, and "in return" it is sent. This time, however, a further reminder is necessary, and so Burton telegraphed, on February 17, saying the "paper" had not arrived, and asking if it was sent; and Mahaney replied on the same date excusing his failure to send the check as stated in his message of the 14th, and saying "it was sent to you yesterday."

Letters of Burton to Harlan and of Dennis to Burton of January 19 and 22, respectively, were excluded from the evidence, and I omit further reference to the telegraphic correspondence of February 11 regarding the McGowan incident.

On February 25 Mahaney telegraphed Burton that it was reliably reported that two special inspectors had

been appointed "to investigate us" and report to the Postmaster-General, asking Burton "to verify and advise at once." To this Burton replied on the 27th: "No complaint in the Department against you. Will write full particulars by to-night's mail." That letter from Burton with another was destroyed at his request.

Mahaney was the doubting partner regarding the value of Burton's services. About the date when Congress adjourned, he became impressed with the necessity of reducing fixed charges. Burton appeared at St. Louis on March 26. Mahaney says that on the occasion of his visit there on that day "the attitude of the Department toward the Rialto Grain and Securities Company was discussed at great length, and I stated to him * * * that as far as my knowledge went there was nothing pending of a dangerous character at that time against the Rialto Grain and Securities Company, and he agreed in that opinion."

> The COURT: Pending where?
>
> A. In the Post-Office Department at Washington. * * * I told him we were anxious to reduce our fixed charges. There had been very heavy drafts on the company in various ways, and inasmuch as he was not going to be in Washington, and there was nothing that I knew of pending there that would occasion his services, I thought it would be perhaps as well to discontinue his services. He agreed in that and I gave him the money. (Rec., pp. 120, 121.)

That was a payment of $500 in cash. During the conversation on this occasion, and after he had been

paid the money, Burton said to Mahaney that letters from a man in his position were likely to be misconstrued, and said that if Mahaney had any correspondence from him it would perhaps be as well to destroy it; that his name had been connected in some newspaper articles with the National Securities Company, and it had created a great deal of unfavorable comment, and he did not want a recurrence of anything of that kind. Thereupon Mahaney produced from his desk two letters written by Burton and destroyed them in Burton's presence. One of these letters was confirmatory of Burton's telegram as to the good standing of the "real McGowan" [the Indian agent] with his superiors. The other was the letter referred to in Burton's telegram of February 26, giving "full particulars" as to the two special inspectors reported to have been appointed.

McRae, the controller of the Rialto Company, was also present at this interview and testified that Burton said that before leaving Washington he had called at the Department and there learned that there were no complaints against the Rialto Grain and Securities Company; that Mahaney had said to him (McRae), in Burton's presence that the Senator had tendered his resignation and severed his connection with the company and had been paid up to date; that the Senator felt that he was not earning his fees in view of the fact that there had been nothing doing for some time past and that everything had been "cleaned up" in the Department.

Burton also had destroyed certain letters written by him to Harlan, which were returned to him by Harlan at his request. On the United States attorney's calling for them in connection with the Federal proceedings against Dennis et al., Burton informed Harlan that he had destroyed them.

During the following summer the investigation upon the additional complaints which had come in against the Rialto Company was pursued vigorously and thoroughly, and this, in connection with the States' activity, resulted in thoroughly breaking up the company.

On January 23, 1904, the indictment against Burton was returned, and on the same day he saw Chief Inspector Cochran again, this time also calling Cochran to his committee room. At that interview Burton, Cochran, Smith (Burton's secretary), and Inspector Vickery, of the Post-Office Department, were present. Burton said he wished to talk the matter over with Cochran, who warned him, properly, that he had been a witness before the grand jury, and should be a witness for the prosecution if the case came to trial, and spoke of official proprieties which prevented him from discussing the case with Burton. Nevertheless, Burton said he wished to recite his recollection of what had occurred. He said that whatever he had done had been done as an attorney for the company; that he had no idea he had committed any impropriety in visiting the Department on matters of this kind; he had so visited the Pension Office. He said he had not been

practicing before the Department. Yet it is clear that he emphasized the fact that he had appeared for the Rialto Company as attorney, for Vickery also testifies to that statement. Evidently he desired that his appearance in his senatorial capacity should be minimized. He added that he had always sought not to antagonize and bias the Department, and that he desired rather that his client should come into harmony with its rules. He said that he had been employed in the case as attorney; that he had received a good fee, with other expressions showing that he rated the value of his own services high.

I have not obstructed this story of the case by constant citation of the record pages. The court will read the record carefully and will see that the story is accurate and strictly justified. I submit that the accused knew the law and his duty well enough; knew what the dangers of his client were and the peril in which he himself stood, and deliberately chose and then eagerly proceeded to render the prohibited services. It is difficult to understand how a United States Senator could render such services in such a matter to such people, even if they had been his constituents and even if he had not taken compensation. No doubt from the mere legal point of view he could have done all he did for his "clients" if he had chosen, as a good-natured service *gratis* to friends, without breach of the statute or even of the ordinary code of ethics, but when he sought and accepted the fees he completed the fatal circle.

JURISDICTION.

The first inquiry which the court will undertake for itself, whether or not counsel discuss it, is that of jurisdiction. It is a matter to be submitted to the court rather than urgently contested in argument. It may no doubt be said that it is very desirable that this court should determine as soon as possible the meaning of the statute and the question of the guilt of the accused, but if the case should for such reasons, or any reasons, reach the court, there is an orderly way, a due course, and a regular time for that purpose. I do not hesitate to express my conviction that the case is not properly before the court now.

It can not be doubted that one of the main purposes of the judiciary act of 1891 was to relieve this court of writs of error in ordinary criminal cases (*Lau Ow Bew, petitioner*, 141 U. S., 583; *McLish* v. *Roff*, 141 U. S., 661; *American Construction Co.* v. *Jacksonville Ry.*, 148 U. S., 372). So far as the grade of offense is concerned, this is such a case. Of course defendant's effort to have the case regarded as an infamous offense could only have related to the right of challenge, for the review of an infamous crime no longer comes before this court, because under the amendment of 1897 (29 Stat., 492) to the judiciary act of 1891, the right of review in this court by direct appeal in criminal cases is restricted to capital cases. The withdrawal from review by this court of other infamous crimes further accentuates the original purpose of the act of 1891 to relieve the court of the larger part of its former appellate criminal jurisdiction.

There is here no ground for review included in section 5 of the circuit court of appeals act. It is true that the jurisdiction of the court below is in issue in a certain sense. That point was made collaterally, but that issue was not sharply drawn in the proceedings below. But whatever may be said about the place of payment of the *checks* as affecting the jurisdiction, there can be no doubt about the *cash* having been paid in St. Louis. Further, in cases in which the jurisdiction of the lower court is in issue, that question alone must be *certified* here to bring the case within section 5.

The case in no wise involves the construction or application of the Constitution or the *constitutionality* of a law of the United States; the inquiry solely relates to the proper *interpretation* of the law.

I can not find that the question of the constitutionality of this statute was raised below at all or appears in any form in the record. I suppose, however, that some argument on that point will be addressed to the court by the plaintiff in error. I submit that it is not before the court, and that if it is raised now, it is a pretext or pretense and a mere endeavor to secure a firm lodgment of the case before this court. That can not be done by mere assertion that the question of constitutionality is involved, when manifestly that is not so. How can it be doubted that Congress, within the most conservative ideas of the scope of its power, can pass a law like this for the moral and legal guidance of its own members and of the executive officers and employees of the Government? How can it be doubted that just as an

inquiry by the Postmaster-General to preserve the purity and effectiveness of the postal service is within his legal and constitutional power as well as within his historical authority, so Congress may comprehensively make the test of the rule which it imposes upon members of the legislature and the executive service the fact that there is some particular business going on in a Department ordinarily calling for services to the private person or persons interested, viz, a charge, an accusation, an arrest, a proceeding, any matter or thing, which plainly includes such an inquiry as is now presented.

I am unable, after careful study and consideration, to perceive a shred of reason why this prosecution below or here can be said to present the question of constitutionality.

No ground appearing, then, for looking upon the case as included, even by strained construction, within the categories of section 5, and there being no doubtful or double aspect of the case suggesting reasons for an alternative direct review in this court as well as in the circuit court of appeals (*Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S., 397 and cas. cit.), it seems manifest that the writ of error already taken out of the circuit court of appeals is the proper one, and that the case is specifically final in that court under section 6 of the circuit court of appeals act as a criminal case, unless this court sees fit now or hereafter to grant the writ of certiorari.

Upon that, the ultimate point regarding jurisdiction, I respectfully take leave to say that while it can not be

doubted that the case, for manifest reasons, is a case of importance, ordinarily the court will not issue the writ until the controversy has been finally settled below, and will not interrupt the orderly course of review by bringing the case here at an intermediate stage, although the court reserves the power to issue the writ at any stage if they think fit to do so.

I submit therefore that it is necessary to conclude that the court is without jurisdiction to consider and determine this writ of error, and that the application for certiorari is premature and ought not to be granted now, at all events.

ARGUMENT.

I.

The inquiry pending before the Post-Office Department was a "matter or thing" in which the United States was "interested" within the purview of section 1782.

The Constitution empowers Congress to establish post-offices and post-roads. Under that power Congress has created the Post-Office Department and the office of Postmaster-General, and authorized and directed him, among other things, to instruct all persons in the postal service with reference to their duties, and to superintend generally the business of the Department and execute all laws relative to the postal service. (Sec. 396, Rev. Stat.)

Congress provided (sec. 3929) that the Postmaster-General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent

lottery, etc., or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post-office at which registered letters arrive directed to any such person to return all such registered letters to the postmasters at the offices at which they were originally mailed with the word "Fraudulent" plainly written or stamped upon the outside of such letters, etc.

Congress also provided (sec. 5480) that if any person, having devised any scheme or artifice to defraud, or [to] be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the Post-Office establishment, etc., shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States or take or receive any therefrom, such persons so misusing the Post-Office establishment shall be punishable by fine and imprisonment.

It is not necessary to delay the court with argument upon the broad scope of the powers thus created and conferred, upon the competence of Congress, or the authority of the Postmaster-General. It is an essential and fundamental part of the idea of posts and postal service that this administration should be a governmental matter of the highest importance and sanction; that broad and exclusive power should be lodged in the central authorities of Government, and that Gov-

ernment should take care that no shelter or aid shall be permitted to fraudulent schemes from the mail service.

In pursuance of his authority the Postmaster-General has established regulations, and among the rules prescribed are those sections referred to in the record which embody the provisions of the Revised Statutes just cited, and direct how departmental inquiries and investigations respecting the fraudulent use of the mails shall be conducted.

One section of the regulations shows their theory, and is sufficient to quote, viz:

> SEC. 44. Post-office inspectors are the special representatives of the Postmaster-General. * * * Alleged violations of law are to be investigated and reported upon by them, and they will, when necessary, aid in the prosecution of all criminal offenses.

All of these powers, authorities, and rules are well within the strictest views of the extent of the post-office branch of Federal power. Upon the foregoing propositions I cite the following authorities, laying down the established principles of law upon the subject:

In *Public Clearing House* v. *Coyne* (194 U. S., 497), which involved the authority of the Postmaster-General to issue fraud orders, Mr. Justice Brown, delivering the opinion of the court, said (pp. 506–507, 508, 509, 510):

> The constitutional principles underlying the administration of the Post-Office Department were discussed in the opinion of the court in *Ex parte Jackson* (96 U. S., 727), in which we held that the power vested in Congress to estab-

lish post-offices and post-roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded. * * * Congress * * * may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy. * * *

It is contended, however, that the laws in question are unconstitutional in that they authorize the Postmaster-General to seize and return to sender all letters addressed to a particular person, firm, or corporation which he is satisfied is making use of the mail for an illegal purpose. * * *

It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an Executive Department. Many, if not most, of the matters presented to these Departments require for their proper solution the judgment or discretion of the head of the Department. * * * Inasmuch as the action of the postmaster in seizing letters and returning them to the writers is subject to revision by the judicial department of the Government in cases where the Postmaster-General has exceeded his authority under the statute (*School of Magnetic Healing* v. *McAnnulty*, 187 U. S., 94), we think it within the power of Congress to intrust him with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases.

In *Bates & Guild Co.* v. *Payne* (194 U. S., 106), where the question involved was the right of the Postmaster-General to refuse the privilege of transmission through the mails as second-class matter to certain publications, the court said:

> We think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster-General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster-General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong, and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied.

In *In re Rapier* (143 U. S., 110), which involved the constitutionality of the anti-lottery act, the court said (p. 134):

> When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. * * * We can not regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of

newspapers is not prohibited, but the Government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communications is not abridged within the intent and meaning of the constitutional provision, unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls.

Following his well-recognized functions in these matters, the Postmaster-General, acting through the assistants and subordinates who represent him and legally and officially speak his will and exercise his discretion as the head of the Department, ordered an investigation of the Rialto Company's affairs upon the receipt of sundry complaints regarding that company's methods. The argument is made by the plaintiff in error at this point that even if there were a pending inquiry—some matter or thing under investigation—these proceedings were pending not before the Department but before the subordinates in the field—that is, the local inspectors at St. Louis; that therefore there was not an inquiry pending before the Department in which the United States was interested. This is preposterous, and it is only necessary to state the suggestion to show its pretense and fallacy.

I may remark here that after the first complaints were received in the Rialto Company affair there appears to have been a lull. Additional complaints

came in from time to time, but no positive and condemnatory report was made by the local inspectors, and the accused and his clients at St. Louis agreed at the end of March, 1903, that there were no troublesome complaints against the company at Washington, and that the matter had been "cleaned up." Subsequently the investigation went on with the results already stated. No criticism, open or covert, of the post-office officials is intended when I say that here is the very evidence of the effectiveness and value of the accused's services to his clients. Because he was Senator, because he was interested and assiduous in his inquiries and representations at the Department, unfavorable action against his clients by the issue of a fraud order in a very damning case was not taken promptly, as would have been clearly legitimate and justifiable under the facts adduced. Action was substantially postponed and the case apparently regarded as venial during Senator Burton's connection with the company, and because of his services.

Returning from this digression, however—at the point reached the argument is made by opposing counsel that at all events there was no inquiry and no proceeding, controversy, charge, or accusation pending before the Post-Office Department in which the United States was directly or indirectly interested.

Civilization and government are not matters of dollars and cents. The ideas which they embody and the results which they seek are practical, of course, but also highly moral. They represent the

development of man beyond as well as in his material needs, and they satisfy other elements in man's nature than bodily appetite and the mere instinct to acquire. It appears to me absurd to suggest that government is only "interested" in a thing of property or money value. The United States is charged to maintain and guard the financial interests of the people. The United States is therefore interested in countless instances where land, money, and goods are involved. None the less is it interested for itself, the Government as an entity, for all the people, and for different groups and individuals among the people, in all sorts of things, events, transactions, and situations which have nothing to do with money. In the end, I suppose, and remotely, many of these matters would ultimately run to a money interest; the United States could be shown to have benefited, to be better off or the reverse, after abstruse calculation, by reason of one contingency or the opposite, respecting such matters in which it is interested. But even if in no sense immediately or remotely an interest in property should appear, none the less the United States is interested. Even individuals are thus vitally interested in a real and true sense in many matters which do not affect their purses; and the theory and contention which are now advanced with apparent earnestness seem to me very strange, viz, that the United States, *parens patriæ*, charged as the Government with the duty of promoting the welfare of the people in all ways known to modern and civilized governments, is not interested in the purity

and effectiveness of its governmental service, but is only interested in the eye of the law provided it has something of practical value at stake, something which can be immediately weighed and measured in money or property.

The primary meaning of "interested" is "to be concerned in a cause or its consequences." This is not a particularly broad meaning. It is the normal and ordinary meaning, and indicates aptly how the United States is interested here, and, I submit, shows conclusively that the Government contention on the subject is sound.

The point, it seems, has never been ruled or much investigated until lately. It is evident that decisions as to the test of the "interest" of an individual respecting the competency of witnesses or respecting private rights of property throw no real light on this question. But certain cases have arisen in the Federal courts in recent years which deal with the subject, most of them relating to the interest of the United States in the purity of the civil service in the honesty of selections for appointment to that service.

In *United States* v. *Bunting* (82 Fed. Rep., 883, 884) there was an impersonation by one person of another at a civil-service examination. Section 5418 of the Revised Statutes was the law presented for construction. That section punishes the forging, etc., of any public record, etc., for the purpose of defrauding the United States. Judge Butler, after saying that when the case first came before him he was under the im-

pression that it was one of conspiracy to defraud, and as the Government had not been defrauded of money or property, he was in doubt whether the statute applied, but that later he had examined the indictments and the law, and was of opinion that the law literally as well as in spirit covers the case, thus declares:

> The offense charged is a grave one, an attempt to prejudice the rights of the United States in the administration of the civil-service statutes. Had the defendants been successful one of them would have obtained a privilege which would have placed him in a favored class and have entitled him to an advantage over others in the appointment to office. The privilege is a valuable one, and the fraud of the defendants was therefore in prejudice of the Government.

In *United States* v. *Bates* (Sup. Ct., D. C., 18 Rep. Civ. Service Com., 141) it was held that falsely making and forging a voucher to an application for examination for appointment is an offense under section 5418.

The two foregoing cases relate to forgery for the purpose of defrauding the United States, but is it not manifest that the United States is *interested* in such a matter?

In *Palmer* v. *Colladay* (18 App. Cas., D. C., 426) it was held that the defendant, charged with conspiring with another person to procure an entry of her name upon a list of eligibles, and presenting a false writing in support of the attempt, was guilty of an offense under section 5440, which punishes a conspiracy either

"to commit any offense against the United States or to defraud the United States in any manner or for any purpose." The court held:

> It is claimed by appellee that to defraud the United States is to deprive it of money wrongfully or of something of money value, and that a falsehood or trick by which its officers are deceived in the matter of selecting those who are to perform work for it could not be a fraud against the United States. We do not agree to this proposition. * * * If falsehoods are imposed upon the person charged with the duty of ascertaining these qualifications [for entry into the civil service], and made to take the place of facts, then the United States is defrauded, is deprived by deceit of the knowledge justly due to its officers in the proper discharge of its business, and it is thereby liable to obtain a less efficient employee.

The last sentence shows how matters in which the United States is interested, or matters in which the United States is likely to be defrauded, may run to and affect its property interests, although on the surface this does not appear to be the case. Is it not a fraud upon the United States, representing all the people, to use the mails to work an artifice to defraud or to obtain money under false pretenses? And when the chances or likelihood of that being done is presented to the Post-Office Department under the law, is not a matter presented in which the United States is interested within the intent and meaning of the statute?

In *United States* v. *O'Connell et al.*, decided February

12, 1903, in the district court for the eastern district of New York, the foregoing authorities were followed, the case being one of false impersonation in a civil-service examination, and defendants were convicted under sections 5418 and 5440.

In *Tyner* v. *United States*, a very recent case (32 Wash. Law Rep., 258), the court of appeals of the District of Columbia followed its decision in *Palmer* v. *Colladay* (*ante*), and denied the contention that to defraud the United States under section 5440 means simply to deprive them of something of pecuniary value.

I cite these cases because, while the law is not the same, nor the analogy complete at all points, nevertheless the underlying principle is the same. In these civil-service cases the proposition established is that the United States is interested in the observance of the law respecting civil-service examinations, and is injured and prejudiced if the law is disobeyed, and is defrauded in a true and just sense if an artifice or wrong is practiced. The injury may be pecuniary, but it may also be serious and far-reaching and yet not of a specific character susceptible of certain ascertainment and pecuniary compensation. In the present case the proposition is that the United States is interested in the effective administration of the postal service; in its purity and freedom from working any wrong; is interested in keeping it from becoming unconsciously an agent of wrongdoers, and an aider of fraud; that when an inquiry relating to the "fraud order" branch of the postal administration is before

the Department the Government is interested directly or indirectly.

The facts in the Tyner case are so fresh in the public knowledge that I do not need to point out the distinctions on the one hand and the similarities on the other between it and the civil-service cases. The court of appeals said, in the course of its opinion holding that willful or corrupt misconduct on the part of an official of the Department is within the comprehension of a statute which makes punishable a conspiracy to defraud the United States in any manner or for any purpose, that—

> The Post-Office Department is charged with the performance of a great public service in which the people of every State, Territory, and district are vitally interested.

Finally, in the case of *Thomas F. Curley et al.* v. *United States*, decided by the circuit court of appeals for the first circuit, in which this court recently declined to grant an application by the defendants for certiorari, the court of appeals, Aldrich, J., held as follows (130 F. R., 1, 3):

> The principal contention of the defendants here is that the word "defraud" in its ordinary common-law acceptation has reference to property and property rights, and the case largely and perhaps wholly depends upon the sense in which the word "defraud" was used in the statute under consideration. Was it intended to limit the scope of the statute to frauds upon property and property rights of the Government, or was it intended to use the word in a

broader sense and for the protection of intangible rights, privileges, and functions of the Government? * * *

In considering a statute enacted for the protection of the Government * * * which declares it a penal offense to conspire to defraud the Government for any purpose, we need not necessarily, we think, approach the question of the interpretation of the word "defraud" from the same standpoint from which the question would be considered if the word "defraud" were used in a State statute enacted for the protection of ordinary property rights of individuals constituting a State; and this is so for the reason that in the one instance the statute in its ordinary acceptation has reference to property and property rights alone, while in the other it has reference to a broader purpose, that of protecting the Government in its administration under the law as well as protecting the property of the Government, which it holds as an incident to the fundamental purpose for which the Government was instituted (p. 8).

A Government does not exist in a personal sense, or as an entity in any primary sense, for the purpose of acquiring, protecting, and enjoying property. It exists primarily for the protection of the people in their individual rights, and it holds property not primarily for the enjoyment of property accumulations, but as an incident to the purpose for which it exists, that of serving the people and protecting them in their rights. * * *

As a moral offense, defrauding the Government of its right and its facilities for rendering

> a proper service to the people, that being the prime object for which it exists, cuts deeper than defrauding the Government of a wheelbarrow, and it is unquestionably within the power of the Government to protect itself against that kind of a fraud (p. 9).

So that I submit, just as the word "defraud" in the cases above reviewed was held to extend beyond the notion of property rights and to include assaults upon the intangible rights and functions of government, so here for similar reasons and upon the same logic must the conclusion be reached that the United States is interested in the sense of the law, not only in a matter pending before a department which relates to and involves money or property, but also in one which affects the intangible concerns, possessions, and duties of government, such as the vigilance, purity, and effectiveness of its mail service.

The claim is that the United States had no direct interest in the issuance of a fraud order. Before the Post-Office Department would be justified in isuing a fraud order under section 3929, it would have to be found that the crime denounced by section 5480 had been and was being committed. If it found that fact, then two things remained to be done: (1) To put a stop to the violations by issuing the fraud order, and (2) prosecute the offenders under section 5480. Will it be contended that the United States has no direct interest in seeing that its laws are not violated, and in punishing the violators? Yet this is the opposing contention.

II.

The services rendered and compensation therefor received by accused were such as are forbidden by section 1782.

As to the substantive offense, that the accused did the forbidden thing is not to be doubted. The record is significant by what unwilling witnesses have forgotten or are loath to say quite as much as by the affirmative testimony for the prosecution. Mr. Burton was certainly counsel or "general counsel" or "associate counsel." Even Mr. Harlan, with all his caution and reserve, felt at liberty to call upon him for "information" (rather than "services"), and "because he was associate counsel, and as such interested" in this or that feature of the business on trial before the Department. He "wanted his assistance," although he left it to Burton to determine what, as Senator, Burton would or would not do. As an instance of such involuntary revelations, Harlan was asked by counsel for the defense:

> Q. What I want to get at is this: Whether in this employment proposed to Senator Burton was anything included as to services to be rendered in any Department of the United States Government.
>
> A. There was nothing said about that *specifically.*

[That is a characteristic way in any such case of denying something of the truth of which the witness is so conscious that he can not wholly deny. Nothing was said *specifically*, but plainly *something* was said.]

Q. On the other hand, wasn't that excluded rather than included? It was not included at all, was it?

A. I have given you his statement in regard to his position as United States Senator, and as far as exclusive language goes I do not remember. I don't want to say one way or the other, but I remember that very distinctly. (Rec., p. 174.)

It is clear enough from the testimony and the letters in evidence—from what was done as well as what was said—that however Burton and his companions might have guarded and hedged even as between themselves the conversation on the train, the accused understood the whole situation and accepted employment which was to include and did include services before the Department. It is equally clear that he accepted compensation, and no amount of precaution at the time or argument now can conceal the fact that he was tempted and fell; that he thought he could do the illegal thing and yet keep his clients and himself within the law. His formal words of protest are like some other famous examples, and only serve to emphasize his knowledge of the prohibition and to bring into sharp relief the inconsistency between his words and his acts.

The trial judge scrupulously refrained from importing any considerations of propriety, and stated with careful precision the legal right of a member of Congress to do all that Burton did up to the payment and receipt of compensation. On these points Judge Adams struck the keynote when he said that the gist

of the complaint is rendering services for compensation—

> The reason of this prohibition [of the statute] is to promote integrity and efficiency, in the discharge of official duties, and to maintain proper discipline in the public service. To permit a Senator of the United States, whose influence by reason of the high position he holds is naturally persuasive and weighty with executive officers, to take compensation from persons for services rendered such persons before an executive department, would, it was thought, create a duty in favor of such persons arising from the implied obligation of fidelity to the client from whom he should accept a fee, inconsistent with those relations of "ready confidence and entire unreserve" which ought to exist between the legislative and executive departments of the Government in the promotion of the public weal and in the enforcement of the laws of the land. * * * Notwithstanding the fact that the accused was a Senator of the United States, he had the legal right, so far as this case is concerned, to practice his profession in any and all of its phases and to receive compensation therefor * * * except that he could not receive compensation for services rendered before the Post-Office Department in any matter pending there in which the United States was interested, as already explained. And in fact the law does not prohibit him from merely rendering services in such matters before the Department. The only prohibition in this respect is against receiving compensation for such services, and

> thereby putting himself into such relations with and under such obligations to the person from whom such compensation is received as are usually created by that act. * * * The gist of the offense denounced by section 1782 is the receiving compensation for services therein referred to. As already stated, the law does not prohibit the mere rendering of services by a Senator before the Department, but the intent and meaning of the law obviously is that if a Senator goes before the Department to render services there to anyone in a matter pending there in which the United States is interested he shall be under no obligation inconsistent with his rendering absolutely disinterested services in such matter. (Rec., pp. 2 0–240.)

And again, when the jury returned for specific instructions, the court said, referring to the portions of the charge which I have just set forth:

> Of course it is not meant that if Senator Burton was employed by the Rialto Grain and Securities Company as general counsel, that that fact permitted him to render services before the Department for which he was to receive and did receive compensation. The gist of the offense charged in the case is rendering services there for compensation; that is the gist of it, rendering services for compensation. So that in answer to the first suggestion I will say it is undoubtedly an incorrect understanding of the law as well as the plain meaning of the statements of the charge to say that merely because the accused was employed

as general counsel, he had the right to render such services before the Post-Office Department. He had the right to go before the Post-Office Department, as I said in substance in the charge several times, in such a way and manner as is consistent with the principles of the law. He could go there and answer questions and make suggestions with regard to any matter that was pending there, provided he did it in a free and independent way, unaffected by the fact of receiving compensation. It would not seem that it is necessary to make further comments with respect to that matter at all. The relations which arise between a lawyer and client when he is employed and is to receive compensation are such as require the attorney at all times and under all circumstances to be faithful to the client and do not permit him to render services against the client in any way or manner. It is for that reason, as I have stated in the charge, that the law prohibits a Senator from entering into relations by which he should receive compensation for those services. He should go before the Department, if at all, as a representative of the people, so that the relation between him and the office should be that of entire unreserve and fairness, unaffected by the fact that he is receiving compensation for the services; so that he should be free; so that he should give information to the Department, which would subserve the interests of the Government and the interests of all concerned, and not be bound by obligations which necessarily inhere from the fact that he is a paid attorney to receive compensation for doing it.

> In other words, as I said before, the gist of the complaint is rendering services for compensation, and therefore the bare fact that he should be employed and had the right to go before the Department to render services does not excuse him, provided he receives compensation for those services (rec., pp. 248–249).

I have quoted here freely from the judge's charge, because it seems to me to bring out his entire fairness to the accused and shows conclusively the soundness of the construction of the law for which we contend. The gist of the offense is the receipt of compensation, and compensation was received.

III.

The district court had jurisdiction of the offense.

On March 26, 1903, the last payment was made at St. Louis to Senator Burton in person and in cash. A check was drawn in the office of the Rialto Company and cashed at their bank, and the bills, five, of $100 each, handed to Burton. If one count of the indictment is good, that will sustain the judgment. (*Rice* v. *Ames*, 180 U. S., 371.)

But the other counts of the indictment are good. The Government proved a custom prevailing in the Washington banks and, indeed, known to all people who have any dealings with banks as prevailing all over the country, by which a bank—taking checks "for collection" just as much in fact as if it were a particular transaction or item technically entered, stamped and indorsed as "for collection" without "returns"

until collected—extends to customers having current accounts, whom they trust and who stand well on their books, immediate credit; the understanding, however, being that the check goes forward for collection for account of and at the risk of the customer, and if not duly paid will be instantly charged back to his account on its return dishonored.

The checks here were drawn to Burton's order as payee by the Rialto Company, upon the Commonwealth Trust Company of St. Louis, and were payable and paid there. They were deposited by Burton to the credit of his current-deposit account with the Riggs Bank, were credited and sent forward for collection in accordance with the rule and custom just stated. It is impossible to sustain the view that these checks, the ordinary cash and demand items of banking transactions, were not actually and legally paid to Burton, the payee upon their face, at St. Louis and by the banking institution located there upon which they were drawn.

Mr. Brice, the cashier of the Riggs Bank, stated the custom on the subject as follows (rec., pp. 106–107):

> The usual custom of the bank, as I stated, is to deposit the check to the credit of the depositor, send it forward direct, either to the place where it is drawn, *for collection*, or else to some convenient collection agency near the place where the check is drawn. If the check is not paid it is returned to the bank in the usual course, going to the bank where it is first sent, and then it takes one of two courses. That check is held in the bank teller's possession until

the depositor calls and takes it up, or else charged against his account as if it were a check drawn against his account and is surrendered to him on settlement of his account, together with other checks or vouchers which he may have drawn, the depositor being duly notified of such nonpayment.

On this point the court charged the jury as follows (rec., pp. 237–238):

It becomes your duty to ascertain and find from the evidence what were the true relations between the accused and the Washington bank when he deposited the check in question with that bank, and what was the understanding between them as to their respective rights in relation to the check and the proceeds thereof. On this question the court charges you as follows:

If it was the intent and understanding of the Washington bank and the accused at the time the latter deposited the check in question with the former that the bank should forward the same in the usual course by and through its correspondents to St. Louis, for payment, and that in so doing it, and its correspondents should act only as the agent of the accused for that purpose, then the final payment by the Commonwealth Trust Company at St. Louis of the check to the correspondents of the Washington bank would amount in law to a payment in St. Louis as charged in the sixth count of the amount of the check to the accused. If, on the contrary, it was the understanding and intent of the Washington bank and the accused at the

time the latter deposited the check in question with the former that the bank should become the purchaser of the check, and should thereafter be the absolute owner thereof, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. Louis by the Commonwealth Trust Company would amount in law to a payment to the Washington bank and not to the accused. In the latter event no crime would have been committed by the accused in this district by reason of the check referred to in the sixth count of the indictment.

In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count was deposited by the accused in the Washington bank for collection, and that the bank was to act in collecting the same as the agent of the accused, and not as the owner of the check in question.

In determining this issue, you are at liberty to and should consider all the evidence adduced; the actual transaction as it occurred at the Riggs Bank, where the check was deposited, the check itself, and all its indorsements, the rights and privileges which were immediately accorded the accused upon making the deposit, the actual conduct and purpose of the Riggs Bank in forwarding the ckeck to St. Louis for payment, the customary conduct and usage of that bank and all banks in Washington at the time so far as shown by the proof. And if from all these facts and all other facts disclosed by the proof,

you find that the check in question was in fact deposited by the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. Louis for collection for account of the accused to make such collection, you should find that when the same was actually paid to the last indorser on the check at St. Louis, by the trust company upon which it was drawn, it was, in contemplation of law, paid to the accused himself.

If on the contrary you find from the evidence that the accused and the Riggs Bank at the time of the deposit of the check in question, understood and intended that the bank should become the purchaser of the check and be its absolute owner, then the subsequent forwarding of it to St. Louis for payment was the act of the bank itself, and the final payment of the check by the trust company at St. Louis was a payment not to the accused, but to the bank, and if such is the fact your verdict on the sixth count must be not guilty.

The seventh, eighth, and ninth counts of the indictment are similar in all respects to the sixth count, with the exception that in the seventh count the accused is charged with having received a check and the proceeds thereof, dated December 15, 1902.

And in the eighth count with having received a check and the proceeds thereof, dated January 22, 1903.

And in the ninth count with having received a check and the proceeds thereof, dated February 16, 1903.

No fault can be found with this charge and with the views of the law upon the subject indicated by the court's statement of the alternative theories upon which the jury should proceed. (*Ward* v. *Smith*, 7 Wall., 447; *Dodge* v. *Savings and Trust Co.*, 93 U. S., 379; *Evansville Bank* v. *German American Bank*, 155 U. S., 556, and cas. cit; *Scott* v. *Ocean Bank*, 23 N. Y., 289.)

It is preposterous to contend that this payment of checks was solely and entirely made in Washington. And it is to be remembered that even if it should be contended that the payment at St. Louis was not a sole and independent transaction, that the process of payment was at least begun in St. Louis and completed in Washington, or begun in Washington and completed in St. Louis, then section 731 of the Revised Statutes applies. That section provides as follows:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired or tried, determined and punished, in either district in the same manner as if it had been actually and wholly committed therein.

Plaintiff asserts, as one of the grounds upon which the jurisdiction of this court is claimed to be based, that the constitutionality of section 731 is involved here. But the constitutionality of that statute is not open to discussion. It has been before this court for consideration and its constitutionality upheld in several cases.

In *In re Palliser* (136 U. S., 257), where the offense consisted in sending a letter, containing a bribe, from New York to a postmaster in Connecticut, the court held that the offense was begun in New York and completed in Connecticut, and that under section 731, petitioner could be tried in Connecticut. As in the present case, it was contended that section 731 was void in view of the provisions of Article III, section 2, of the Constitution, which provides that in all criminal prosecutions accused shall have the right to be tried by an impartial jury of the State and district wherein the crime shall have been committed; but that that statute did not cover the case, as the alleged crime was complete when the letter was mailed in New York. The court pointed out that the right secured by Article III, section 2, of the Constitution is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district "wherein the crime shall have been committed," and that therefore in the case of a crime begun in one district and completed in another, which may under section 731 be held to be committed in either district, the accused, in being tried in either district is still within his constitutional right.

> When a crime is committed partly in one district and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate; and Congress has accordingly provided that "when any offense against

> the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either. * * *
>
> In the case before us * * * it might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that, if any offense was committed in New York the offense continued to be committed when the letter reached the postmaster in Connecticut; and that if no offense was committed in New York an offense was committed in Connecticut; and that in either aspect the district court of the United States for the district of Connecticut had jurisdiction of the charge against the petitioner (pp. 266–267).

To the same effect was *Horner* v. *United States* (143 U. S., 207), which involved the offense of mailing a lottery circular at New York to a person in Illinois.

In *Putnam* v. *United States* (162 U. S., 687) the president of the Bank of Exeter, N. H., was indicted in that State for defrauding the bank. Accused, while in Boston, Mass., drew checks on a Boston bank having funds of the Exeter bank on deposit, and obtained and used the money in Boston. He was tried in New Hampshire on the theory that the abstraction was had in that State, as the drawing out of the money from the Boston bank exhausted the credit of the Exeter bank. The court said it was clear that although the commission of the offense charged may have been

begun in Massachusetts, if it was completed in New Hampshire the court had jurisdiction under section 731, Revised Statutes, adding (p. 711):

> On the face of the foregoing facts it is evident that the alleged criminal acts arising from the two January checks were begun in Massachusetts. The question is, Were such acts there completed, or did the final fact, which was essential to effectually absorb the credit of the Exeter bank with the Boston bank, take place in New Hampshire? The relation between the banks was that of debtor and creditor. The checks having been drawn, collected, and debited in Boston, constituted a concluded transaction, if there was authority to draw them. * * * If * * * the checks were unauthorized and the illegal debit which was made as the result of their payment was ratified and made binding in New Hampshire by the Exeter bank, it is clear that the act which consummated the taking of the credit of the Exeter bank was completed in New Hampshire, and was therefore within the jurisdiction of the court.

IV.

It was competent for the accused to waive his constitutional privilege of freedom from arrest, and he was not arrested.

The Articles of Confederation provided (Art. V):

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their

> persons from arrests and imprisonments during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

This language shows the fundamental purpose in all such provisions which appear in the free government charters of English-speaking people.

The first form of the privilege is found in the Bill of Rights of 1689, from which so many of our constitutional guaranties were drawn even down to forms of expression, viz:

> That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament. (Stubbs, Select Charters of Constitutional History, second edition; Oxford, Clarendon Press, pp. 523–525.)

This, the original form so far as I can discover, shows the theory and the reason which I have just pointed out.

The purpose of this particular form of legislative privilege has been to protect members of the law-making assemblies from royal oppression and executive tyranny, often exerted until recent centuries by summary and disciplinary processes, sometimes through executive officers, sometimes through the courts, against recalcitrant and daring members of the legislature. Slight reflection on the parliamentary history of England between 1625 and 1660, for instance, will confirm this statement. The particular right of legislators which was thus to be preserved was the right of

free speech, and in considering the meaning and extent of the privilege that ground and reason for it must not be forgotten. The provision in the Constitution merely omits the statement of the reason as a general and preliminary principle, and gives it as an alternative or additional branch of the privilege. It is (Art. I, sec. 6, cl. 1):

> The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during the attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

In *Coxe* v. *McClenachan* (3 Dall., 478) there was a judgment against defendant, a member of Congress, which was in session at the time, returned *non est*, and then a *sci. fa.* against special bail when the defendant was surrendered to the sheriff; and then a motion was made for leave to enter an *exoneretur*. The case was compromised by an agreement that the bail should remain responsible to surrender within four days after the end of the session—that is, the defendant was in effect arrested, having been placed in the custody of the sheriff by his bail, and besides, he contended *ab initio* for his privilege instead of waiving it.

But the privilege includes other grounds than freedom of speech and is ancient, and the subject must be more carefully examined.

The privilege under our Constitution is not to be confounded with the ancient "privileges of Parliament," which are numerous, vague, and indefinite, and run to the idea of prerogative and the immunities of noble rank. These privileges, not originally including freedom of speech, were of person, of domestics, and of lands and goods. Parliament was the only judge, not so much of what they were as when they were offended. They were traced to the laws of Edward the Confessor and the old Gothic constitutions. (1 Bl. Com., Lewis's ed., pp. 164, 165; Bowyer's Com. on Constl. Law of England, 2d ed., pp. 82–84; Hallam's Const. Hist., Vol. III, pp. 379, *et seq.;* Salk., 505; *Stockdale* v. *Hansard*, 9 Ad. and El., 225.) Blackstone says (*ut sup.*): "Neither can any member of either house be *arrested and taken into custody, unless for some indictable offense*, without a breach of the privilege of Parliament." And see Bouvier, Rawles' Rev'n, vol. 2, p. 755, where the privilege is restricted to arrest on *civil process*—temporary, as in the case of legislators, *eundo, manendo, et redeundo;* and it is said that it does not extend to defendants in *criminal* cases. This is again the intimation in Bowyer, *ut sup.* (p. 84), where it is said that the members of Parliament are exempt from arrest *in civil suits*, and that the privilege does not extend to treason, felony, and breach of the peace, nor to contempts of court which are *in the nature of criminal offenses.* It seems evident that one of the foundations of the right was the principle that the realm was entitled to the legislator's services uninterrupted by

the constant *arrests for debt* and detention in "sponging houses" which were prevalent during former times. As I have said, the modern extension of the privilege, which has been specifically shown to be the only basis for it in this country, viz, to protect freedom of speech, appeared in England first in the Bill of Rights of 1689 (1 Wm. & M., s. 2, c. 2) and soon thereafter the general privileges were restricted to prevent "any inconveniences that may happen by privilege of Parliament," by the 12 and 13 Wm. III, c. 3, which provided that while an action of debt might proceed and should not be stayed under color or pretense of privilege, no peer of the realm or lord of Parliament should be *arrested* or *imprisoned* during the continuance of the privilege, that is, during a session (See also 11 Geo. II, c. 24; 10 Geo. III, c. 50.) In 1 James I, c. 13, it was provided that after a session new writs of execution may issue and the person from whose custody a privileged person was delivered should not be charged.

In Viner's Abridgment (2d ed., vol. 11, p. 36), in commenting on 1 Jac., 1 cap. 13 (*ut supra*), a marginal note indicates a public interest in the question. It was resolved (one in execution having had a writ of privilege and the sheriff setting him at liberty; *quære*, Shall he be taken in execution again after the Parliament is ended?):

> *First*, That the privilege was grantable, notwithstanding the execution, because the King and the Realm have an interest in the body of every burgess of Parliament, and the common weal shall be preferred before the interest of

any private person. *Secondly*, That after the Parliament ended he might be taken in execution again; for that the plaintiff shall not be prejudiced in his execution by the act of the law which doth wrong to no man. (Heath's Maxims, 279; citing S. C.)

Here, again, the legislator was actually *arrested and claimed his privilege*, and in the present case there is no conflict between the *public* interest and the claim of a *private creditor* and suitor.

As to the personal nature of the right, in *Bartlett* v. *Hebbes*, 5 Term Rep., 686, East, the learned advocate and reporter said in argument, in speaking of the privilege of an officer of the King's household against an arrest for debt: "This is not like the case of an infringement of the franchise of a private lord, in which the courts have held the arrest good as against the party, though the lord might maintain an action for the breach of his privilege, *he alone* being injured by the arrest."

I think, therefore, on the whole, it is sound to conclude that here in America the ancient and prerogative character has disappeared from the personal privileges of legislators; that the main purpose of the privilege here is to protect freedom of speech; that it is only an exemption from *arrest* and in civil suits; that it does not grant immunity, even temporarily, from a criminal prosecution; that it does not operate to delay the proceedings on a trial; that it is personal and must be seasonably claimed, and may be waived without violating principle or injuring public interests.

In *Geyer's Lessee* v. *Irwin* (4 Dall., 107) the supreme court of Pennsylvania said:

> A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. And, we think, that upon principle, his suits can not be forced to a trial and decision, while the session of the legislature continues.
>
> But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The judges are not bound, judicially, to notice a right of privilege, nor to grant it without a claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege, as an objection to the trial of the cause: and this amounts to a waiver, by which the party is forever concluded.

The distinguished judges composing that court appear to have entertained no doubt that it is competent to waive the privilege and that there may be a waiver by acts and acquiescence. Here the privilege was indignantly repudiated by the defendant's words and prompt action in appearing and urging immediate trial.

Bouvier (as cited *ante*) points out how the privilege may be enforced if violated by *arrest*, viz, by the legislature itself, referring to Cooley and other authorities, and he quotes from Brett as follows: "When attachment is mere process, privilege exists; when it is *punitive* or *disciplinary*, privilege does not exist."

But I submit that the point of law as to exceptions

from the privilege has been *conclusively* determined. Thus Blackstone says (vol. 1, p. 166):

> The only way by which courts of justice could anciently take cognizance of privilege of Parliament was by writ of privilege, in the nature of a supersedeas, to deliver the party out of custody when arrested *in a civil suit.* For, when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it as contrary to their oath of office. But since the statute 12 W., III, c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular *ab initio*, and that the party may be discharged upon motion. It is to be observed, that there is no precedent of any such writ of privilege, *but only in civil suits;* and that the statute of 1 Jac., I., c. 13, and that of King William (which remedy some conveniences arising from privilege of Parliament), *speak only of civil actions.* And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or, as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any crime whatsoever, for all crimes are treated by the law as being *contra pacem domini regis.* And instances have not been wanting wherein privileged persons have been convicted of misdemeanors, and committed or prosecuted to outlawry even in the middle of

a session; which proceeding has afterwards received the sanction and approbation of Parliament. To which may be added, that a few years ago the case of writing and publishing seditious libels was resolved by both houses not to be entitled to privilege; and that the reasons upon which that case proceeded extended equally to every indictable offense.

Blackstone cites authorities for this view.

And Judge Story, in his work on the Constitution, says, section 865:

The exception to the privilege is, that it shall not extend to "treason, felony, or breach of the peace." These words are the same as those in which the exception to the privilege of Parliament is usually expressed at the common law, and were doubtless borrowed from that source. Now, as all crimes are offenses against the peace, the phrase "breach of the peace" would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order. And so, in truth, it was decided in Parliament, in the case of a seditious libel published by a member (Mr. Wilkes), against the opinion of Lord Camben and the other judges of the court of common pleas, and, as it will probable now be thought, since the party spirit of those times has subsided, with entire good sense and in furtherance of public justice. It would be monstrous that any member should protect himself from arrest or punishment for a libel, often a crime of the

deepest malignity and mischief, while he would be liable to arrest for the pettiest assault or the most insignificant breach of the peace. [See notes citing authorities.]

What happened in this case; what did Senator Burton do? He waived his privilege promptly, fully, and indignantly. He went to St. Louis as fast as steam could carry him. "He said he was going to St. Louis as soon as he could and insist upon a trial." "Senator Burton says he will go at once to St. Louis and defend the case, and has no doubt that he will be able to make it perfectly clear that there was no reason for bringing the indictment." "Senator Burton declared his intention of going to St. Louis and expects to leave here some time to-morrow afternoon." "I have not violated any law, nor is it my intention to seek vindication by any technicality." (Testimony of Lindsay and Aubere, verifying interview with Burton, and "dictated statement" in Kansas City Star and St. Louis Globe-Democrat, respectively, of January 23, 1903; rec., pp. 151–162.) Burton himself testified as follows on direct examination:

Q. When were you advised of the fact of your indictment?

A. On the afternoon of the 23d of January last. * * *

Q. Now, how soon after that did you leave Washington for St. Louis, with reference to your appearance here?

A. I left in about twenty-four hours.

Q. Did you come to St. Louis as speedily as possible?

A. Yes, sir; there was but one train I could have come on sooner.

Q. And when did you get here?

A. We were delayed about twenty-two or twenty-three hours, and I think arrived on Tuesday afternoon, leaving there on Sunday.

Q. Detained by what?

A. Detained by a snowstorm.

Q. And how soon after your arrival here did you enter your appearance in court here?

A. The next morning. (Rec., pp. 223, 224.)

Mr. Burton thus waived his privilege by his action and by his prompt and eager appearance to answer the charge and go to trial. The privilege objection was never hinted at during the trial, and was first raised by his counsel on the motion in arrest of judgment which the court overruled without opinion. They say it "is not merely a personal privilege, but is a prohibition against arrest *or judicial proceedings*." The prohibition is not against *judicial proceedings*, but only against *arrest*. It does not mean that a member of Congress shall not be tried for an offense which he commits, but only that he shall not be taken into custody or forced to trial against his will during a particular period. And it does not extend to prosecutions for crime; that we have shown above. The privilege is merely personal, and is traceable to the principle of free speech and freedom from compulsion to answer elsewhere for legislative utterances. It is not at all like the constitutional duty and right of jury trial (with its concomitants), which is a universal mandate

to guard a system of jurisprudence and protect all the people, and therefore can only be waived, modified, or dispensed with under certain special circumstances and in certain peculiar situations because of the *public* interest in the principle.

> We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. * * * The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty can not be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. (4 Bl. Com., 11.) Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial—that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution. (*Hopt* v. *Utah*, 110 U. S., 574, 579.)

It is evident that the present case does not fall within that principle. The privilege is purely personal, for a special reason of limited application, and no logical argument can be advanced why it may not be waived. The point rather falls within the ground of decision in the recent oleomargarine cases (*Schick* v. *United States; Broadwell* v. *United States*, 195 U. S., 65), viz: "When there is no constitutional or statutory mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."

It is well for opposing counsel to remember, in their effort to raise the grade of offense here, that the line between clearly marked felonies and infamous crimes, or crimes bearing an infamous punishment, is delicate and difficult to draw; that, presumptively, if an offense is not a misdemeanor it is a felony, and that while that doubt here, if well founded (which I deny, as heretofore shown), would have given the defendant ten challenges instead of three, equally would it operate to dispose of the privilege now claimed, for that does not extend to felony by the very language of the Constitution. And, besides, "breach of the peace" includes all indictable offences.

On April 6, 1904, when Congress was in session, the accused was sentenced (Rec., pp. 25, 26). The sentence directed the marshal to deliver the prisoner to his jailer, but did not express the date from which sentence was to run or direct the marshal to proceed forthwith. It must be assumed that the court intended the sentence to take effect when legally this could

happen—that is, after the session of Congress had ended. And, besides, "thereupon"—that is, as soon as sentence was pronounced—the defendant's bill of exceptions was tendered to the court and duly allowed and sealed as part of the record; the defendant was immediately admitted to bail and a supersedeas was awarded and judgment and sentence stayed. Furthermore, if a sentence is erroneous, that does not invalidate the trial and judgment. This court either corrects (*United States* v. *Pridgeon*, 153 U. S., 48) or remands the case for correction by the trial court. (*In re Bonner*, 151 U. S., 242; *Ballew* v. *United States*, 160 U. S., 187, 202.)

It is unnecessary to asseverate that the Government keenly realizes the gravity and meaning of this case and the heavy responsibility which rests upon the prosecuting officers. That feature has been matter of scrupulous deliberation and solemn reflection all through these proceedings—before the indictment was drawn, in the presence of the grand jury, in the trial court, and here. The Government has been aware of its duty as prosecutor toward the defendant, but the earnest prosecution of crimes and misdemeanors is one of the foundations on which society rests—a chief instrument and force in holding society together. This case peculiarly illustrates the need in these times of imposing and maintaining high standards of civic conduct, especially in that delicate and sensitive medium where the legislature and the executive meet. If the atmosphere there is not pure, it does not require recent

examples to point out the deadly menaces to our healthy national life. Judge Adams finely states to the jury the proper guides and rules for the conduct of members of Congress in this domain, which, it is sad to say, Senator Burton wholly ignored and violated.

I respectfully submit that the writ of error should be dismissed for the lack of jurisdiction; or, if the court hold otherwise on that point, I submit that there was no error in the trial and that the judgment and sentence below must be affirmed.

HENRY M. HOYT,
Solicitor-General.

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